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Arizona Corporation Commission

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**BEFORE THE ARIZONA CORPORATION COMMISSION**

TOM FORESE  
CHAIRMAN

BOB BURNS  
COMMISSIONER

DOUG LITTLE  
COMMISSIONER

ANDY TOBIN  
COMMISSIONER

BOYD DUNN  
COMMISSIONER

**IN THE MATTER OF THE  
APPLICATION OF ARIZONA PUBLIC  
SERVICE COMPANY FOR A  
HEARING TO DETERMINE THE FAIR  
VALUE OF THE UTILITY PROPERTY  
OF THE COMPANY FOR  
RATEMAKING PURPOSES, TO FIX A  
JUST AND REASONABLE RATE OF  
RETURN THEREON, TO APPROVE  
RATE SCHEDULES DESIGNED TO  
DEVELOP SUCH RETURN.**

**DOCKET NO. E-01345A-16-0036**

**DOCKET NO. E-01345A-16-0123**

**IN THE MATTER OF FUEL AND  
PURCHASED POWER  
PROCUREMENT AUDITS FOR  
ARIZONA PUBLIC SERVICE  
COMPANY.**

**ENERGY FREEDOM COALITION  
OF AMERICA'S RESPONSE TO  
APS'S MOTION FOR PROTECTIVE  
ORDER**

*(Expedited Consideration Requested)*

Arizona Public Service Company's (the "Company") Motion for Protective Order recaps a motion it already lost. It offers nothing new to refute the dictates of Arizona Statutes, Commission Rules, or Rules of Civil Procedure protecting the right to take depositions.

The Company's unsupported Motion threatens the orderly progress of discovery in this case. If the Company refuses to produce witnesses while its Motion is pending, it will

1 delay the depositions until after the deadline for rate design testimony. All intervenors will  
2 lose the chance to use those witnesses' testimony in their direct expert testimony. Energy  
3 Freedom Coalition of America ("EFCA") requests the Commission order an expedited oral  
4 argument, deny the Company's Motion, and allow depositions to proceed promptly.

#### 5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 The Company already filed and lost a motion for protective order attempting to  
7 prevent depositions. In that motion, the Company resisted the deposition of its witness,  
8 Barbara Lockwood. The Company made the same arguments it makes here, quibbling  
9 about whether depositions are necessary in Commission proceedings. EFCA's response  
10 demonstrated that Arizona Statute (A.R.S. § 40-244) and Commission Regulations (Ariz.  
11 Admin. Code R14-3-109(P)) protect the right to conduct depositions.

12 In oral argument, the Company's counsel distinguished Lockwood - a policy  
13 witness - from technical experts like Leland Snook and Charles Miessner. It recognized  
14 expert witnesses like Snook and Miessner were fair deponents. Its counsel admitted "if  
15 [EFCA] were to notice Leland Snook's deposition or Chuck Miessner's deposition and  
16 said we really want to get into DG and demand charges and we want these facts and we  
17 need to investigate this, that would be a totally different conversation."<sup>1</sup>

18 The Commission rejected the Company's argument and allowed EFCA to conduct  
19 depositions.

20 Nothing has changed since the Commission rejected the Company's argument. The  
21 Legislature did not amend A.R.S. § 40-244. The Commission did not change Rule R14-3-  
22 109(P). The circumstances have not changed. The Company does not allege any new facts  
23 or developments which justify abandoning this Commission's prior decision. Because  
24 nothing changed, the Company admits that this motion for protective order merely "renews  
25 its [prior, rejected] objection."<sup>2</sup> EFCA asks the Commission to renew its ruling.

#### 26 **I. ARIZONA LAW AND COMMISSION REGULATIONS ALLOW DEPOSITIONS.**

27 Arizona law protects EFCA's right to depose the Company's witnesses. A.R.S. §

28 <sup>1</sup> See Exhibit 1 (Transcript of Oral Argument) at page 43, line 24 through page 44 line 4.

<sup>2</sup> Motion for Protective Order at 2:9.

1 40-244(A) provides “any party, may take depositions as in a court of record.” Commission  
2 regulations similarly recognize that “any party to any proceeding before it may cause the  
3 depositions of witnesses to be taken in the manner prescribed by law and of the civil  
4 procedure for the Superior Court of the state of Arizona.”<sup>3</sup>

5 Commission regulations also incorporate Arizona’s Rules of Civil Procedure by  
6 reference.<sup>4</sup> These rules protect the right to take depositions.<sup>5</sup> These rules deserve “a broad  
7 and liberal treatment.”<sup>6</sup> They certainly allow parties to depose a few key witnesses in  
8 Arizona’s largest ever rate case.

9 **A. *Depositions are the only way to get the witness’s perspective rather than a***  
10 ***Company line.***

11 Depositions yield testimony from the witness rather than the lawyer. Company  
12 lawyers drafted the pre-filed testimony in this case.<sup>7</sup> And lawyers often write responses to  
13 data requests. The Company’s motion admits that a deposition yields “a single witness’  
14 perspective, rather than the Company’s final answer.” It also admits that “Commission rate  
15 proceedings can often require multiple perspectives.”<sup>8</sup> EFCA wishes to discover the  
16 individual perspectives of the Company’s chosen witnesses; the Company’s own motion  
17 admits a deposition is the best discovery device for that information.

18 The Company recognized that Lockwood’s, Snook’s, and Miessner’s perspectives  
19 are each separate, distinct, and necessary. That is why each is a separate witness. Surely,  
20 the Company would not waste the Commission’s time by multiplying witnesses who lack  
21 unique, relevant perspectives. EFCA should have a chance to discover these unique  
22 perspectives.

23 **B. *Snook and Miessner merit deposition.***

24 Barbara Lockwood, the Company’s witness, repeatedly identified Snook and  
25 Meissner as the individuals with personal knowledge of the Company’s claims. For

26 <sup>3</sup> Ariz. Admin. Code R14-3-109(P).

27 <sup>4</sup> Ariz. Admin. Code R14-3-101(A).

28 <sup>5</sup> Ariz. R. Civ. P. 30 & 32.

<sup>6</sup> *Skok v. City of Glendale*, 3 Ariz. App. 254, 257–58, 413 P.2d 585, 588–89 (1966).

<sup>7</sup> Exhibit 1, page 43 lines 15-16.

<sup>8</sup> Motion for Protective Order at at 3:17.

1 example, EFCA asked Lockwood about the Company's position on grandfathering solar  
2 customers. She responded "I don't know" but "Leland Snook or Chuck Meissner" would.<sup>9</sup>  
3 Lockwood testified about the size of an alleged cost shift; but she does not know the basis  
4 for that claim. She admitted that Snook knows; her testimony parroted Snook's  
5 calculation.<sup>10</sup> She admits that other statistics in her testimony are merely "restating what  
6 Mr. Snook found."<sup>11</sup>

7 In fact, the Company previously admitted that Snook and Miessner are fair  
8 witnesses for deposition. When the Company originally refused to produce Lockwood for  
9 deposition, it argued that she was just a policy witness rather than a technical expert. It  
10 distinguished Lockwood, who the Company thought should not be deposed, from technical  
11 experts like Snook and Miessner, who the company tacitly admitted are fair game.<sup>12</sup>

12 EFCA has now noticed Leland Snook's deposition and Chuck Miessner's  
13 deposition. EFCA wishes to investigate DG and demand charges. It needs to depose the  
14 Company's key witnesses on this issue.

## 15 **II. Deposing key witnesses is not an undue burden.**

16 The Company's general distaste for depositions does not merit a protective order.  
17 "The various means of discovery may be used in any sequence and with unlimited  
18 frequency up to the point where a party *shows* annoyance, embarrassment, oppression, or  
19 undue burden or expense."<sup>13</sup> As the party resisting discovery, the Company has the burden  
20 of proof.<sup>14</sup> It does not meet that burden.

21 The Company's sole undue burden contention appears to be that it does not like the  
22 dates EFCA chose. That contention does not justify the relief sought i.e. prohibit the  
23 depositions altogether. In fact, during the personal consultation, EFCA offered to  
24 reschedule the depositions if the Company could commit to a reasonable date. The  
25 Company refused to cooperate.

26 <sup>9</sup> Exhibit 2, Deposition of Barbara Lockwood, page 50 lines 1-6.

27 <sup>10</sup> Exhibit 2, page 50 line 20 through page 51 line 4.

<sup>11</sup> Exhibit 2, page 92 lines 4-5.

<sup>12</sup> Exhibit 1, page 43 line 24 through page 44 line 4.

28 <sup>13</sup> *Hine v. Super. Ct. In and for Yuma County*, 18 Ariz.App. 568, 571, 504 P.2d 509, 512 (1972) (emphasis added).

<sup>14</sup> *Id.*

1 EFCA's rate design deadline looms; its testimony is due January 27. It needs to  
2 complete depositions of the Company's two critical rate witnesses promptly, so its expert  
3 can discuss that testimony.

4 **CONCLUSION**

5 All intervenors should have a chance to question the Company's key rate personnel  
6 before they submit rate design testimony. The Commission should protect that right by  
7 promptly rejecting the Company's regurgitated argument. EFCA requests an expedited oral  
8 argument, before January 12, so the depositions may proceed as scheduled.

9  
10 Respectfully submitted this 6<sup>th</sup> day of January, 2017.

11  
12 /s/ Court S. Rich  
13 Court S. Rich  
14 Rose Law Group pc  
15 Attorney for Energy Freedom Coalition of America  
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1 **Original and 13 copies filed on**  
2 **the 6<sup>th</sup> day of January, 2017 with:**

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 W. Washington Street  
6 Phoenix, Arizona 85007

7 *I hereby certify that I have this day served a copy of the foregoing document on all parties of*  
8 *record in this proceeding by regular or electronic mail to:*

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## **EXHIBIT 1**

1 same here, or I don't think it should be the same here  
2 as they would be if it was in Superior Court.

3 ACALJ JIBILIAN: Mr. Loquvam, any closing  
4 statements?

5 MR. LOQUVAM: A lot has been said, and I don't  
6 want to belabor any sort of points.

7 I would note that DG and demand charges aren't  
8 revenue requirement. And I know Mr. Rich left open,  
9 hey, there might be other issues. But from what I  
10 heard, those issues include like bias. And she is an  
11 APS witness. She is going to be interested in APS's  
12 position. I mean that's kind of a nonstarter from our  
13 perspective.

14 And the truth is, is that the testimony, her  
15 personal relationship with the testimony, it was written  
16 at her direction in part by me, so, and we talked about  
17 it. And some of it had legal advice and work product.  
18 And some of it had -- sort of in the end she read it  
19 over and made her changes and said this is the testimony  
20 I would like. So it is not she sat there with articles  
21 and said, great, here it is. It is, as the common  
22 practice with really busy executives is, there is a team  
23 of folks that help her.

24 So it is not -- again, if they were to notice  
25 Leland Snook's deposition or Chuck Miessner's deposition

1 and said we really want to get into DG and demand  
2 charges and we want these facts and we need to  
3 investigate this, that would be a totally different  
4 conversation. But we have here a nonrevenue requirement  
5 witness who is the most prominent individual associated  
6 with APS's lawsuit recently, in an election year. And  
7 there is just a lot of potential for mischief.

8 And we echo some other concerns about just case  
9 management and having a thoughtful way. And people need  
10 to have the rights they need to have. But we just, we  
11 will keep our eye on case management, and the fact that,  
12 if this is in fact the tip the iceberg, we are going to  
13 be back, we are going to be back here.

14 ACALJ JIBILIAN: Mr. Robertson.

15 MR. ROBERTSON: Thank you, Your Honor.

16 Using Mr. Van Cleve's metaphor of the tip of the  
17 iceberg or the iceberg, I am not sure Your Honor is in a  
18 position today, quite frankly, to determine which of  
19 those two options it is. And the thought occurs to me,  
20 and this requires good faith on the part of those  
21 parties who are involved in the immediate deposition, of  
22 perhaps going forward with the deposition of  
23 Ms. Lockwood at whatever point in time you deem  
24 appropriate and see how that goes. Because Mr. Loquvam  
25 has always got the opportunity, if he feels Mr. Rich is

## **EXHIBIT 2**

1 THE WITNESS: I don't know.

2 BY MR. RICH:

3 Q. Okay. And who would be the right witness to  
4 ask about that?

09:59:01 5 A. That would be either Leland Snook or Chuck  
6 Miessner, Charles Miessner.

7 Q. Does the company have any internal documents  
8 that reflect in detail the grandfathering policy that  
9 you propose?

09:59:19 10 A. I don't know for certain. It may be in our  
11 application in the details of the rates themselves. It  
12 may be in the work papers.

13 Q. Are you aware of any documents that exist  
14 regarding the treatment of grandfathered customers that  
09:59:40 15 have not been submitted in this rate case?

16 MS. REFO: Object to form.

17 THE WITNESS: I am not aware of any specific  
18 information other than what is in our filing.

19 BY MR. RICH:

09:59:59 20 Q. Okay. On line 12 of page 4, you mention a  
21 \$27.3 million cost shift. Do you see that?

22 A. I do.

23 Q. Okay. Is that a number that you derived?

24 A. That number was derived based on our cost of  
10:00:22 25 service study that was completed for this rate case.

1 Q. Okay. And who is the person at the company  
2 that is most knowledgeable about how that number was  
3 derived?

4 A. That would be witness Leland Snook.

10:00:40 5 Q. Are there any intervenors in this case that are  
6 having their legal fees paid for by Arizona Public  
7 Service?

8 A. Yes.

9 Q. Can you list them?

10:01:06 10 A. Arizona Investment Council and ConservAmerica.

11 Q. And is APS paying 100 percent of the legal fees  
12 for those two entities?

13 A. For our case, yes.

14 Q. So you mentioned ConservAmerica. I was going  
10:01:23 15 to ask you if you are familiar with them. You are,  
16 correct?

17 A. I am familiar with, generally familiar with  
18 ConservAmerica.

19 Q. Okay. What is Arizona Public Service's  
10:01:31 20 relationship with ConservAmerica?

21 MS. REFO: Object to form.

22 THE WITNESS: Can you expand on what you mean  
23 by relationship?

24 BY MR. RICH:

10:01:44 25 Q. Sure. Do you provide funding in addition to

1 Q. Okay. So you are restating what Mr. Snook  
2 found then in that case, correct?

3 (Mr. Hays enters the deposition room.)

4 THE WITNESS: I am restating what Mr. Snook  
11:08:30 5 found.

6 BY MR. RICH:

7 Q. Back to the 2 percent increase, if that's  
8 allocated to customers the same way that the rate  
9 increase in this case is allocated, then would you agree  
11:08:44 10 that the residential class would be looking at an  
11 approximately 10 percent rate increase?

12 MS. REFO: Object to form.

13 THE WITNESS: That's a hypothetical question.

14 BY MR. RICH:

11:08:54 15 Q. And --

16 A. I can't agree to that, because it is a  
17 hypothetical question. We have not determined how it  
18 will be allocated.

19 Q. Okay. But I don't think it is a hypothetical.  
11:09:04 20 If it is allocated the same way that you have done in  
21 this case, that would be a 10 percent increase for  
22 residential customers, correct?

23 MS. REFO: I object to the form. By definition  
24 it is a hypothetical.

11:09:15 25 THE WITNESS: I can't agree to that because we